83-182

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JUL 4 1983
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

NO._____

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SMITTY BAKER COAL COMPANY, INC.
AND RALPH BAKER,

Petitioners,

v.

THE FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION,

Respondent

and

GLEN MUNSEY,

Intervenor-Respondent.

---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. EDWARD INGRAM
ROBERTSON, WILLIAMS, INGRAM,
PAULKNER & OVERSEY
Tenth Floor
Andrew Johnson Plaza
Knoxville, Tennessee 37902
(615) 522-2717
Counsel for Petitioners

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982
NO._____

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SMITTY BAKER COAL COMPANY, INC.
AND RALPH BAKER,

Petitioners,

v.

THE FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION,

Respondent

and

GLEN MUNSEY,

Intervenor-Respondent.

---

**PETITION FOR A WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

TO THE HONORABLE, THE CHIEF JUSTICE
AND ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES:

PETITIONERS, SMITTY BAKER COAL COMPANY, INC. AND RALPH BAKER, RESPECTFULLY PRAY THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THIS CASE

## QUESTIONS PRESENTED FOR REVIEW

1. Can attorneys fees and costs be allowed in a discriminatory discharge action under the Federal Coal Mine Health and Safety Act, 30 U.S.C. §820(b) (1969) where the record and stipulation of counsel conclusively show that none were "incurred" as expressly required by said Act?

2. Can attorneys fees be allowed in a discriminatory discharge action under the Federal Coal Mine Health and Safety Act, 30 U.S.C. §820(b) (1969) for representation provided by salaried union staff counsel with no expectation of payment for services?

3. Can attorneys fees be allowed in a discriminatory discharge action under the Federal Coal Mine Health and Safety Act, 30 U.S.C. §820(b) (1969) where no contemporaneous or probative attorney time records are filed?

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## OPINION BELOW

The Per Curiam Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

## JURISDICTION

The judgment and opinion of the Court of Appeals was entered on March 11, 1983. A timely petition for rehearing or, alternatively, suggestion for rehearing en banc was denied on May 6, 1983. This Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

## STATUTORY PROVISION INVOLVED

United States Code, Title 30:

> §820(b)(3). "Whenever an order is issued under this subsection, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation."

## STATEMENT OF THE CASE

This is an action for discriminatory refusal to rehire a coal miner after a voluntary quit. The action was commenced in 1971 under The Federal Coal Mine Health and Safety Act, 30 U.S.C. §820(b) (1969) by intervenor-respondent Glen Munsey. The case has had a tortuous history including two previous appeals to the Court of Appeals. See Munsey v. Morton, 507 F.2d 1202 (1974) and Munsey v. Federal Mine Safety & Health Review Commission, 595 F.2d 735 (1978). The intervenor-respondent Munsey has been for the most part unsuccessful. During some twelve years of litigation he has been found entitled to $2,858.26 in back pay for petitioner's discriminatory refusal to rehire him after he voluntarily quit his employment.

During the period 1971-1976, Munsey was represented by staff counsel for his union, the United Mine Workers of America. From 1977 to the present he has been represented by the same attorney who is now in private practice.

In the proceedings below, the United Mine Workers of America did not appear or intervene seeking the allowance or reimbursement of attorney's fees or expenses. The former union staff counsel, Mr. Steven B. Jacobson, Esq. did request attorney's fees and expenses be awarded in the amount of some $109,000.00. In support of the request, he filed an unauthenticated summary, by year, of estimated time spent on the matter and suggested hourly rates to be utilized in computing the fee allowance. Objection was made by petitioners because of the lack of authentication, the absence of time records and other probative supporting materials, contemporaneous or otherwise. Petitioners' objection below was overruled subject to Munsey's counsel filing such supporting records and materials upon which the estimated time summary was based. Subsequently, the summary of estimated time was authenticated and filed. No time records or other probative supporting materials were ever filed.

At the hearing below, Munsey's counsel stipulated on the record that "Mr. Munsey has never been charged for expenses, and is not expected to pay back any fees".

The Commission's Administrative Law Judge found that attorney's fees were not allowable for the period prior to 1977 when Munsey was represented by union staff counsel. For the period after 1977, when Munsey's counsel had left his union employment and entered private practice, the ALJ awarded $26,462.50 in attorney's fees. This award was based upon the then authenticated summary of estimated time. As found by the ALJ, "Counsel did not state whether the hours claimed were established by daily records, by reconstruction through close examination of the record of the case or by mere estimation". Despite the absence of probative records which would permit anyone to determine the reasonableness of the hours claimed, the ALJ held that the burden of justifying any deviation from the amount awarded "rests with the party proposing the deviation" - namely petitioners.

The ALJ also refused to consider any adjustment in the fee award based upon the mostly unsuccessful results of Munsey's counsel to obtain more than a nominal back pay award. He reasoned that Munsey's personal right and the rights of all miners as a class to be free of unlawful, safety-related discrimination had been vindicated.

The Court of Appeals, per curiam, upheld the ALJ in all respects save the finding that Munsey could not be awarded any costs or attorney fees for the period during which he received free representation of staff counsel of his union. Based upon the representation of Munsey's counsel at oral argument that he and the union had agreed to allow him to collect the full fee without reimbursement of the union's expenses, the Court of Appeals remanded to allow counsel to be directly awarded fees for the period prior to 1977.

Hence, at this point, Munsey has recovered $2,858.26 in back pay. Additionally, despite the fact that he has incurred no direct or contingent obligation to pay attorney's fees and expenses and despite

the fact that no probative attorney time records or materials have been furnished, he has been awarded $26,462.50 in attorney's fees and the case remanded for a further award of attorney's fees during the period when his counsel was a salaried union staff attorney.

## REASONS FOR GRANTING THE WRIT

### 1. The Decision Below Conflicts With The Express Requirement Of The Act That Attorney's Fees Be "Incurred".

The intervenor-respondent Munsey, as a successful applicant below, is entitled to have petitioners assessed with "a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonable incurred by the applicant . . ." 30 U.S.C. §820(b)(3) (1969). The Act clearly and expressly permits the recovery of only fees and expenses reasonably incurred by an applicant. These words must have some meaning. They cannot be simply

ignored. The most obvious and reasonable interpretation is that Congress contemplated payment or the undertaking of an obligation to pay by an applicant as a prerequisite to recovery.

The record in this case, as cited to the Court of Appeals, absolutely and irrefutably shows that Munsey incurred no attorney's fees, costs or expenses in this case. Munsey expressly testified that he never even retained counsel. There was no pro bono agreement here. He was represented by salaried staff counsel of his union. That union has made no request for reimbursement of any legal fees or expenses. When Munsey's staff counsel left the union, he continued to appear in these proceedings. It is stipulated in the record that no payment was expected by him from Munsey.

It is respectfully suggested that the Court of Appeals erroneously failed to consider and apply the plain express language of the Act when it allowed attorney's fees under these circumstances. Only this Court can correct that error.

2. The Decision Below Conflicts With Prior Decisions Of The Court Of Appeals As To Attorney's Fee Allowances For Services Rendered By Salaried Union Staff Counsel And Presents An Important Case Of First Impression.

In extending to Munsey the right to recover attorney's fees for his representation by salaried union staff counsel, the Court of Appeals relied upon Nat'l Treasury Employees Union v. U.S. Dep't of The Treasury, 656 F.2d 848 (1981). That case involved claims made by a union for services rendered pursuant to the union's prepaid legal services plan in a suit under the Privacy Act of 1974. There it was recognized that even under otherwise appropriate circumstances, a union could only recoup the expenses it incurred in supplying services to the client; above-cost fees to the union itself being inappropriate. That decision was expressly limited to the facts of that case. 656 F.2d at 855.

Here no prepaid legal services plan is involved. The union seeks no fees or expenses. No

pro bono representation agreement was made. Munsey's counsel was paid a handsome salary during his tenure with the union while prosecuting this case. He was never employed or retained by Munsey.

Despite the prior holding in Nat'l Treasury and the completely dissimilar facts of this case, the Court of Appeals held that the union would be entitled to costs and attorney fees for representation of union member Munsey. It also held, based on representations by Munsey's counsel at oral argument that he and the union had agreed that counsel could collect the full fee without reimbursing the union, that above-cost (market value) fees could be recovered since they were to be awarded to the attorney alone (and not for the union's general treasury). Such representation by counsel was completely outside the record in the case. Indeed, no evidence or similar representation had been made below. Petitioner's had no opportunity to corrobrate or conduct examination regarding any arrangement between the union and counsel.

It is respectfully submitted that such representations as to substantive matters outside the record are completely inappropriate in appellate practice. However, when such representations, then are used to form the basis for the opinion of the Court of Appeals, a complete miscarriage of justice occurs.

The opinion of the Court of Appeals conflicts with the previous decision in Nat'l Treasury and also erroneously is based upon matters outside the record in the case. Hopt v. Utah, 114 U.S. 488; Adickes v. Kress & Co., 398 U.S. 144, 157-158, N.16. Only this Court can correct such errors.

3. The Decision Below Conflicts With the Decisions Of Other Courts Of Appeals As Well As Those Of The District Of Columbia Circuit.

In Johnson v. Georgia Highway Express, Inc., the Fifth Circuit set criteria to be met by an applicant for an attorney's fee award noting that the applicant "has the burden of proving his entitlement to an award for attorney's fees just as he would bear

the burden of proving a claim for any other money judgment. 488 F.2d 714, 720 (5th Cir. 1974). The Fifth Circuit included in that burden the production of detailed accurate attorney time records.

In Copeland v. Marshall, the D. C. Circuit relied upon and extended Georgia Highway Express noting that in the absence of detailed accurate time records, no judicial body can make a determination of the number of hours reasonably expended by an attorney. 641 F.2d 880, 890-91 (D.C. Cir. 1980).

In National Association of Concerned Veterans v. Secretary of Defense, the D. C. Circuit laboriously established definitive standards and requirements for awarding prevailing party attorneys fees. Specifically, the Court noted certain threshold criteria, to wit:

1. Conclusory "information and belief" affidavits presenting prevailing community hourly rates will not suffice;

2. Evidence of counsel's actual billing practices and rates should be submitted;

3. Casual after-the-fact estimates of time expended are insufficient to support an award. Rather, contemporaneous, complete and standardized time records must be presented;

4. Broad summaries of work done and hours logged are insufficient;

5. Nonproductive or unsuccessfully spent time should be excluded with such time detailed in the application. 675 F.2d 1319, 1325-28 (D.C. Cir. 1982).

No contemporaneous, complete, detailed or actual time records were submitted in this case despite the objection by petitioner's counsel to their absence. The only documentation purportedly supporting an attorney's fee award in this case is a broad, conclusory, unsupported summary of counsel's time as he estimates it over the twelve-year history of this case.

The record in this case is devoid of probative evidence to support an award of attorney's

fees and expenses. Further there is no evidence as to time and expenses devoted to the many unsuccessful issues in this case.

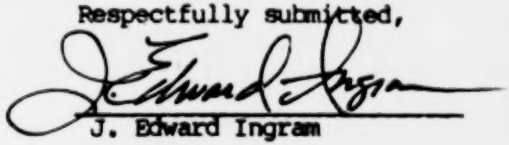
These deficiencies and conflicts with prior decisions were called to the attention of the Court of Appeals twice. Nevertheless, they were ignored. These conflicts justify the grant of certiorari to review the judgment below.

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

August 4, 1983



J. Edward Ingram

ROBERTSON, WILLIAMS, INGRAM,
FAULKNER & OVERBEY
J. Edward Ingram
Tenth Floor
Andrew Johnson Plaza
Knoxville, Tennessee 37902
(615) 522-2717

Counsel for Petitioners

# APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 82-1079

GLEN MUNSEY, PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

---

No. 82-1084

SMITTY BAKER COAL COMPANY, INC. and RALPH BAKER, PETITIONERS

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

GLEN MUNSEY, INTERVENOR

---

Petitions for Review of an Order of the Federal Mine Safety and Health Review Commission

---

Argued February 4, 1983

Decided March 11, 1983

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Steven B. Jacobson* for Glenn Munsey, petitioner in No. 82-1079 and intervenor in No. 82-1084.

*J. Edward Ingram* for Smitty Baker Coal Company, Inc. *et al.*, petitioners in No. 82-1084.

*James A. Lastowka*, General Counsel, Federal Mine Safety and Health Review Commission, was on the statement in lieu of brief for respondent. *Palma R. Vanni*, Attorney, Federal Mine Safety and Health Review Commission, entered an appearance for respondent.

Before WRIGHT and BORK, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the court *per curiam*.

PER CURIAM: This case has twice before been heard by this court. *See Munsey v. Morton*, 507 F.2d 1202 (D.C. Cir. 1974); *Munsey v. Federal Mine Safety & Health Review Comm'n*, 595 F.2d 735 (D.C. Cir. 1978). The opinions issued on those prior occasions fully set forth the factual background of this case and underscore the urgent need to bring this litigation to an end.

This court, with one exception noted below, upholds the determinations of the Federal Mine Safety and Health Review Commission, generally for the reasons set forth in the findings of the Administrative Law Judge adopted by the Commission. *See* 3 Joint Appendix (JA) 1665-1682, 1716.

We reverse the determination of the Commission that petitioner Munsey cannot be awarded *any* costs or attorney fees for the period during which he received free representation by staff counsel of his union. The ALJ recognized that under the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 820(b)(2) (1976), successful petitioners are entitled to recover their attorney fees and that under such authority fees have been awarded to attorneys in private practice, private legal services organizations, and public interest law firms. However, he saw nothing "to justify the extension of the right to recover fees or ex-

penses under such circumstances to unions or collective bargaining agents." 3 JA at 1679.

The ALJ is incorrect. This circuit has recognized that unions and union attorneys are entitled to costs and attorney fees for representation of union members. *Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981). If attorney fees are awarded to the union itself rather than its attorney, the union can only recoup the expenses it incurred in supplying services to the client; above-cost fees to the union itself would be inappropriate. *Id.* at 853. If attorney fees are awarded to the attorney alone (and not for the union's general treasury), the attorney is entitled to receive the market value of the services rendered. The mere fact that an attorney is a salaried employee of the union should not affect the size of the fee to which he is entitled. *Id.* at 850. "Reasonableness, in terms of market value of the services rendered, is the sole limit on fee awards to organizationally-hired lawyers when the fees are to be paid to the lawyers alone." *Id.* at 852-853.

On remand, the Commission should determine the amount to be awarded in accordance with the standards set forth in *Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury, supra.*[1]

*Affirmed in part and reversed and remanded in part.*

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[1] We note that in past cases we have required salaried attorneys recovering the market value of their services from defendants to reimburse their employers for the kinds of expenses the employers incurred that would normally be included in an attorney's fee, including the salaries of the lawyers and their adjunct staff. *See Wilderness Society v. Morton*, 495 F.2d 1026, 1037 (D.C. Cir. 1974) (*en banc*), *rev'd on other grounds sub nom. Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In this case, however, Munsey's attorney represented at oral argument that he and the union had agreed to allow him to collect the full fee without reimbursement of the union's expenses. On the strength of this representation, we direct that all fees go to the attorney himself.

United States Court of Appeals

FOR THE [illegible]

No. 82-1084 September Term, 19 82

Smitty Baker Coal Company, Inc.,
and
Ralph Baker,
Petitioners

v.

The Federal Mine Safety and
Health Review Commission,
Respondent

Alan Munsey,
Intervenor

And consolidated case No. 82-1071

ARGUED 2-4-83

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 6 1983

GEORGE A. FISHER
CLERK

BEFORE: Wright and Bork, Circuit Judges, and [illegible], Senior Circuit Judge

ORDER

On consideration of petitioners' petition for rehearing, filed April 22, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

[illegible]

No. 82-1084

Sept. Term, 19 82

Smitty Baker Coal Company, Inc.,
and
Ralph Baker,
Petitioners

v.

The Federal Mine Safety and
Health Review Commission,
Respondent
---
Glen Munsey,
Intervenor
---
And consolidated case No. 82-1079

ARGUED 2-4-83

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 6 1983

GEORGE A. FISHER
CLERK

BEFORE: [illegible]

O R D E R

Petitioners' suggestion for rehearing en banc has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

Office-Supreme Court, U.S.
FILED
SEP 12 1983
ALEXANDER L. STEVAS,
CLERK

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1982**

NO. 83-182

---

SMITTY BAKER COAL COMPANY, INC.
AND RALPH BAKER,

Petitioners,

v.

THE FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION,

Respondent,

and

GLEN MUNSEY,

Intervenor-Respondent.

---

**ON PETITION FOR WRIT OF CERTIORARI**

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# SUPPLEMENTAL APPENDIX

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J. EDWARD INGRAM
**ROBERTSON, WILLIAMS, INGRAM, PAULKNER & OVERBEY**
Tenth Floor
Andrew Johnson Plaza
Knoxville, Tennessee 37902
(615) 522-2717
Counsel for Petitioners

**SUPPLEMENTAL APPENDIX**
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges

2 Skyline, 10th Floor

5203 Leesburg Pike

Falls Church, Virginia 22041

| | |
|---|---|
| GLEN MUNSEY, | ) Application for |
| | ) Review of Discharge |
| Applicant, | ) or Discrimination |
| | ) |
| v. | ) |
| | ) Docket No. |
| SMITTY BAKER COAL COMPANY, | ) NORT 71-96 |
| INC., P & P COAL COMPANY, | ) |
| AND RALPH BAKER, | ) |
| | ) |
| Respondents. | ) IBMA 72-21 |

## DECISION

Appearances: Stephen B. Jacobson, Esquire, Los Angeles, California, for Applicant, Glen Munsey;

J. Edward Ingram, Esquire, Knoxville, Tennessee, for Respondents, Smitty Baker Coal Company, Inc., and Ralph Baker;

Joseph E. Wolfe, Esquire, Norton, Virginia, for Respondent, P & P Coal Company.

Before : Judge Stewart

## FACTUAL AND PROCEDURAL BACKGROUND

This is a proceeding on remand of the Federal Mine Safety and Health Review Commission (Commission) for additional findings on (1) whether appropriate offers of reinstatement have already been made by (i) P and P Coal Company or (ii) Ralph Baker, (2) the amount of lost wages due Glen Munsey, and (3) the costs and expenses to be awarded.[1]

This case began on April 22, 1971, when Glen Munsey (Applicant) filed an application for review of an alleged discriminatory discharge by the Smitty Baker Coal Company, Inc., on April 15,

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[1] Munsey v. Smitty Baker Coal Company, Inc., P & P Coal Company and Ralph Baker, 2 MSHC 1052 (1980) (hereinafter, Munsey II).

1971. The application sought relief under section 110(b) of the Federal Coal Mine Health and Safety Act of 1969 (the Act), 30 U.S.C. § 820(b).

Applicant, a jacksetter, left his job underground at the face of Smitty Baker No. 1 Mine along with two other miners due to alleged unsafe roof conditions in the area where he was working. When outside the mine, Applicant asked if he could go home and return to work the next day. It was explained to him that it would be unfair to allow him to go home while there were other miners who chose to stay and work in the area where the roof had been checked and found to be safe. After Munsey refused to return to his regular duties at the face, he was offered the opportunity to do different work

sufficiently far removed from the allegedly dangerous area to dispel any fear which he may have had regarding returning to work setting jacks.

At a meeting on April 29, 1971, Applicant's union representative made Ralph Baker an offer to waive back pay if he put Munsey back to work immediately at Smitty Baker Coal Company. There was also a confrontation involving a threat that the operator would be put out of business if the Applicant was not rehired. Under these circumstances, Ralph Baker declined to rehire Munsey immediately but indicated that he

would take Applicant[2] back to work later. In its first decision remanding the case to the Board of Mine Operation Appeals (Board), the U.S. Court of Appeals, District of Columbia Circuit, made it clear that a wrongful failure to rehire could be discriminatory action under the Act. It included an order that the Board decide whether the refusal to rehire was actuated by a forbidden retaliatory motive.

Pursuant to a motion by the Applicant, the Board, in the absence of a timely objection, added three

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[2]Munsey was joined in his application by miners Ernest and Arnold Scott. They subsequently withdrew from the case, filing affidavits stating that they had only participated initially because they were advised that they had to do so by officials of the United Mine Workers of America. These two miners were later rehired by Ralph Baker.

Respondents, P & P Coal Company, Mr. Ralph Baker, and Mr. Smitty Baker to the proceeding without prejudice to the presentation of any defenses on the merits by them.

On July 7, 1975, the Board issued a Memorandum and Order which retained jurisdiction over the proceeding but referred it for further hearing and a written recommended decision by an Administrative Law Judge.

In that decision which was issued on June 25, 1976, after the second hearing conducted December 2-4, 1975, the Administrative Law Judge made recommended findings and conclusions concerning the nine specific issues presented on remand and those germane to the case at that time, including a finding that the failure to rehire

Munsey on April 29, 1971, was in violation of the Act.

On the second appeal, the United States Court of Appeals for the District of Columbia affirmed the Administrative Law Judge's recommended finding that Smitty Baker Coal Company and Ralph Baker violated section 110(b) of the Federal Coal Mine Health and Safety Act of 1969 but remanded the case to the Federal Mine Safety and Health Review Commission (Commission) to consider additional issues.[3] Since the

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[3]These findings were required due to the changed posture of the case. Although the Board of Mine Operations Appeals declined to adopt the recommended decision that the failure to rehire on April 29, 1971, was in violation of the Act it specifically indicated that the relevant issues had been considered. Glen Munsey v. Smitty Baker Coal Company, Inc., Ralph Baker, Smitty Baker, and P & P Coal Company, IBMA 72-21 (June 30, 1977); 8 IBMA 47, 48, 50.

time that the controversy arose in 1971, Smitty Baker Coal Company has ceased mining operations, including those at the No. 1 Mine where Munsey had been employed; P & P Coal Company has obtained a lease from Peabody Coal Company and opened a mine on property which had been the former Smitty Baker Mine designated as the No. 2 Mine; and Ralph Baker has incorporated a new mining company, Mason Coal Company, in a different location from that of the former Smitty Baker Coal Company operation.

The Commission in its decision issued on December 4, 1980, held that Ralph Baker can be ordered to reinstate Munsey at Mason Coal Company; that P & P Coal is a successor to Smitty Baker Coal Company; and that Ralph Baker, Smitty

Baker Coal Company, and P & P Coal Company are jointly and severally liable for the illegal discrimination against Glen Munsey.

Upon assignment of the case for rehearing, a hearing was set for December 16, 1980. When Applicant indicated that he had not yet received the Commission's decision and could not be prepared by that date, the hearing was reset for January 13, 1981, and the hearing was held on that date in Abingdon, Virginia. Applicant was not prepared to submit evidence concerning earnings, attorney's fees, and costs. The record was left open for late filing of statements of attorney's fees, costs and Munsey's earnings that were to be obtained from the Social Security Administration.

At the hearing, the attorneys for the respective parties agreed that, with regard to the prior testimony in the two earlier hearings conducted in this case, counsel for Respondents would designate within 10 days of the date of the latest hearing those portions of the testimony which they deemed to be pertinent to the three issues under consideration herein. Thereafter, counsel for Applicant would have the opportunity to designate back to counsel for Respondents any portion of the record that it deemed pertinent to the issues under consideration. At that point, counsel for Respondent would undertake the responsibility of reproducing copies of those portions designated and would supply them to the Judge for inclusion

in the record of this proceeding. These materials were filed on March 3, 1981.

Counsel for the parties agreed to the following schedule for the filing of briefs in this matter. Within 25 days from receipt of the transcript from the reporter, Respondents would brief the reinstatement issue.[4] Within 25 days from receipt of Respondents' brief on the reinstatement issue and the filing of late materials that had been agreed to, Applicant would thereafter

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[4]The posthearing brief for Respondents Ralph Baker and Smitty Baker Coal Company was filed on March 3, 1981. Counsel for Respondent P & P Coal Company requested, and was granted an extension of time in which to file a brief on the issue of reinstatement. This brief was filed on April 15, 1981, and the time constraints for the filing of subsequent briefs were adjusted accordingly. Applicant filed his posthearing briefs on June 25, 1981. Respondents Ralph Baker and Smitty Baker Coal Company filed a reply brief on July 14, 1981. The Applicant failed to file its final reply brief within the prescribed time.

thereafter file its brief as to all issues in the case. Within 10 days from receipt of Applicant's brief on all issues in the case, Respondents would file a reply brief on the reinstatement issue and their principal brief as to the issues of back pay and attorneys' fees in this case. Within 10 days of receipt of Respondents' brief on those matters, Applicant would file a reply brief as to all issues in the case.

Proposed findings of fact and conclusions of law in the briefs filed by the parties which are immaterial to

the issues presented or inconsistent with this decision are rejected.[5]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Reinstatement

In its decision on remand, the Commission noted that the record raises

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[5]Parts of the posthearing briefs were devoted to issues which have already been resolved by the Commission and the U.S. Court of Appeals D.C. Circuit. Respondents Smitty Baker Coal Company, Inc., and Ralph Baker argued that since no complaint has been filed charging discrimination on April 29, 1971 (failure to rehire), or at any time other than April 15, 1971 (date of discharge) Munsey has failed to complain of discrimination on April 29, 1971, and that matter may not now be considered. Respondents also argued that because of statement in Munsey's posthearing brief that "Applicant no longer contends that Ralph Baker and Smitty Baker as individuals may be held responsible * * *" he has waived any claim against either Ralph Baker or Smitty Baker by abandoning any contentions against them after the second administrative hearing. Respondents further argued that the cessation of operations of Smitty Baker Coal Company, Inc., on October 1, 1971, was due to a strike and was not a subterfuge, and that Mason Coal Company is not a proper party to these proceedings. Since these issues have been previously resolved, they were not reconsidered in this proceeding.

a question as to whether Baker may have already made a suitable offer of reinstatement since Baker testified in December, 1975, that he offered Munsey employment at Mason Coal Company "maybe a year ago, maybe not that long." In his testimony, Munsey mentioned neither an offer of employment from Baker nor a request for a job at Mason Coal. The Administrative Law Judge had recommended that Munsey be awarded $2,013.26 for his loss of pay during the period from April 30, 1971, until October 30, 1971, when Smitty Baker Coal Company ceased operations. After remand by the D.C. Circuit and a finding that P & P Coal Company was a successor to Smitty Baker Coal Company and that Ralph Baker could be ordered to reinstate Munsey at Mason

Coal Company, it became necessary to make specific findings on the issue of whether a suitable offer of reinstatement had been made.[6] The Commission, in its decision on remand, included findings to the effect that, if a suitable offer was made and refused, then the need to offer reinstatement now is moot and that the making of a suitable offer would toll the accumulation of lost wages due to Munsey as a result of the violation.

An offer of reinstatement can be considered "suitable" or "appropriate" if it was made unconditionally, unequivocally, and in good faith. Lipman Brothers, Inc., 164 NLRB No. 850 (1967). The offer must be one

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[6] Munsey II at 1053.

of full reinstatement to his former position, or should that position no longer exist, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges.

The record on remand establishes that although no appropriate offer of reinstatement was made by P & P Coal Company, appropriate offers of reinstatement were made by Ralph Baker at Mason Coal Company.

Munsey, or someone representing him, discussed reemployment on a number of occasions with Clyde Poe, Charlie Poe[7] or Ralph Baker. Respondents'

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[7]Charlie James Poe and Clyde Poe were co-owners of P & P Coal Company at the times pertinent herein and remained so at the time of the hearing held January 13, 1981.

witnesses related occasions on which offers of employment were made to Munsey. At the hearing on remand, Munsey testified that he did not remember such offers being made but he did not introduce evidence sufficient to rebut the clear and convincing testimony that the conversations concerning the offers occurred.

Munsey related occasions on which Respondents turned down requests for employment made by him or on his behalf. Respondent made no attempt to rebut much of this testimony. It was established, however, that in the course of a number of these conversations, Munsey stated that he already had a good job elsewhere. The detailed findings on the issues of whether P & P Coal Company or Ralph Baker made a suitable offer of reinstatement are set forth below.

No Suitable Offer of Reinstatement Made by P & P Coal Company

A suitable offer to reinstate Glen Munsey was not made by P & P Coal Company. Although employment was discussed by Munsey, or someone representing him, and a representative of P & P Coal Company on several occasions, at no time did P & P Coal Company make an unconditional, unequivocal, good faith offer to hire Munsey.

1. At the 1981 hearing herein, Clyde Poe testified that on or about Friday, March 10, 1972, he and Charlie James Poe met Munsey as they were going into a bank. Charlie James Poe asked in a "light-hearted manner" if Munsey wanted a job and Munsey replied that he had a job already and did not want a job at P & P. Clyde Poe

characterized the conversation as "light-hearted" because Charlie James Poe is a very talkative person. He acknowledged that it was not a serious conversation.

Although Munsey testified at the most recent hearing that he did not recall this conversation, the clear and convincing testimony of Clyde Poe establishes that the conversation took place. Poe also truthfully admitted the circumstances and the manner in which Munsey was asked if he wanted a job even though they were such that the conversation cannot be considered an appropriate offer of reinstatement.

2. At the hearing held in 1975, Charlie James Poe testified that he had a conversation relating to employment with Munsey on or about

Saturday, March 11, 1972. He testified that he met Glen Munsey and Fred Coeburn[8] in a parking lot and that Munsey asked him for a job. Poe responded, "Well, Glen, I'm hiring men off Ralph's panel and if you're on his seniority list, I'll get to you and give you a job." In reply, Munsey laughed and said: "No, I don't want no job up there. I got a good job over in Kentucky." Poe asserted that Munsey then told him the name of his employer.

Prior to this testimony by Charlie James Poe, Munsey had testified on cross-examination that he did not remember a conversation of this nature. Although Munsey's testimony might be

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[8]Fred Coeburn was the section foreman at Smitty Baker Coal Company who had allegedly discharged Munsey on April 15, 1971.

construed as a denial that the conversation on March 11, 1972,[9] occurred, it certainly was not as convincing as that of Poe who was certain of all aspects of the conversation except the exact date on which it occurred. Here again, Poe gave the full details of the conversation, including those detrimental to his case. Charlie Poe's "offer" of a job to Glen Munsey on this occasion was made contingent upon Munsey being a member of the panel of former Smitty Baker Coal Company employees. This panel listed the former employees by seniority and served as the basis by which P & P hired its miners. Those miners hired from the panel were

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[9]At the hearing held in 1973, counsel inferred during cross-examination that this conversation occurred on March 13, 1972.

chosen by seniority without further screening.

On Sunday, March 12, 1972, a meeting called by Charlie James Poe was held in the UMWA hall in St. Charles. At this meeting, P & P hired its employees from the panel comprised of the former employees of Smitty Baker Coal Company. Munsey went to the meeting but left after he and a number of other former employees who had been fired by Smitty Baker Coal Company were told that they were not on the panel. Munsey did not actually check to see if his name was on the panel or not.

At the 1975 hearing, Charlie James Poe testified that he did not hire Munsey at the time because Munsey had informed him that he already had a job and did not want to work for P & P. Poe believed that all of Smitty Baker's men

were on the list but he did not check the panel list used by the union and he did not do the actual hiring. The evidence fails to establish that Munsey was on the panel comprised of Smitty Baker Coal Company employees at the time the company ceased operations. His name was not likely to be on such a panel since he had previously terminated his employment with that company. Neither Munsey nor Charlie James Poe saw the actual panel list from which former employees of Smitty Baker Coal Company were chosen by the union. Poe believed that Munsey's name was on his list of panel members and assumed that Munsey was included on the union's list. On the other hand, Munsey and a number of other miners were denied employment specifically because they were not on the panel.

The offer of employment made by Charlie James Poe on March 11, 1972, was premised on Munsey being a member of the panel of Smitty Baker Coal Company employees. The qualification attached to this "offer" rendered it, in effect, no offer at all.

4. P & P Coal Company signed a contract with the UMWA on March 11, 1972,[10] or thereabouts. Ed Gilbert testified that on the day that the contract was signed, he went to Charlie James Poe at his home and spoke with him about the rehiring of Mr. Munsey and the Scotts.[11] In the course of this

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[10]At the hearing held in 1975, Ed Gilbert mistakenly testified that P & P signed the UMWA wage agreement on March 13, 1972.

[11]The Scotts were two miners who had left the employment of Smitty Baker Coal Company at the same time as Munsey.

conversation, Charlie Poe did not say absolutely whether he would hire either Munsey or the Scotts. Mr. Gilbert stated the UMWA position and asked Poe to put them back to work. According to Gilbert, Mr. Poe responded that he had worked out a deal with Smitty Baker whereby Smitty Baker would be responsible for anything that would happen and that they were not going to hire them.[12] At the 1975 hearing, Charlie James Poe

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[12]At the 1975 hearing, Ed Gilbert testified that he told Poe at the time of this conversation that the discrimination case was pending. On the other hand, Charlie James Poe testified at that hearing that he did not speak with Ralph Baker about any agreement not to hire certain of the employees of Smitty Baker Coal Company and that the first he heard of the discrimination case was when he came into the hearing on that morning. This conflict in testimony has already been effectively resolved in finding that P & P Coal Company, Inc., was a successor to Smitty Baker Coal Company, Inc.

denied the existence of any agreement with Ralph Baker to discriminate against Munsey. While the conversation may not have included an absolute refusal to rehire Munsey, there was no appropriate offer of reinstatement at that time.

5. At the 1975 hearing, Munsey testified that he asked P & P Coal Company three times for a job and he described two of those occasions. His testimony was, in substance, that he spoke with Charlie James Poe about 2 weeks after Poe took over the mines. Poe was putting in a crusher at the mines on a Saturday. When Munsey asked him for a job, Poe responded "You wouldn't want to work here at this place." Poe did not give any reason for this statement.

Munsey's testimony on this point, although lacking in some detail, was given in a straightforward manner. The approximate date, the gist of the conversation, and the circumstances surrounding the incident were stated in such a manner as to establish that the incident did occur.

Munsey also testified that "he went back to Charlie James Poe once again and asked him about a job and was told by Poe at that time they were not doing any hiring." There were no witnesses present. At the 1981 hearing, Munsey reiterated that he had asked Charlie James Poe for a job and Poe said that he was not hiring anybody. Although Munsey's testimony regarding this incident lacked clarity and detail, it was given in such a manner as to establish that the conversation did

occur. It is clear that no appropriate offer of reinstatement was made in the course thereof.

6. Approximately 9 months to a year after P & P Coal Company opened, Munsey asked Ed Gilbert to intercede with Charlie Poe to get him a job with P & P Coal Company. Ed Gilbert spoke with Poe over the telephone. Poe told Gilbert that he was not hiring because his business was in a slump. There was clearly no appropriate offer of reinstatement on the occasion.

7. Approximately 2 years before the December 5, 1975, hearing, Glen Munsey's wife went to Clyde Poe's store and asked him for a job on behalf of Glen Munsey. Mr. Poe responded that P & P Coal Company was not hiring. Again, there was no offer of reinstatement on this occasion.

Suitable Offer of Reinstatement
Made by Ralph Baker

Smitty Baker Coal Company closed down operations in October, 1971. Ralph Baker started the Mason Coal Company early the next year, opened the mine in May, 1972, and started running coal in June of 1972.

The record establishes a pattern by Munsey of requesting employment at both P & P Coal Company and Mason Coal Company even though he already had a job and had no intention of leaving to accept another. It was not established whether this course of conduct was idle conversation between acquaintances or a deliberate attempt to make a case for his discrimination proceeding. In any event, while P & P Coal Company did not make an appropriate

offer, Mason Coal Company needed Munsey's services and made more than one suitable offer to reinstate him.

Glen Munsey testified that he did not go to Smitty Baker Coal Company or anybody connected with it and request that he be rehired after April 29, 1971; that he never spoke with Mr. Baker regarding employment at Mason Coal Company, nor had he ever conferred with anyone he knew to be or thought might be a foreman or a superintendent a: Mason Coal Company about working for that company, and that to his recollection, he never had anyone else contact Baker for him. Under the circumstances this testimony lacks credibility.

Munsey also testified that from 1971 through 1974, he worked for Helen Ann Coal Company. His job with that

company was "running bridge * * * on a miner." The "bridge" is a short conveyor which carries the coal cut by the continuous miner back to the main conveyor. Mr. Munsey's station as a bridge operator was approximately 90 feet outby the coal face but he had to approach the face regularly in the performance of his job. When Munsey was employed by Smitty Baker Coal Company, he was a jacksetter, a job which required him to work in the immediate vicinity of the coal face. Munsey did not work as a jacksetter at Helen Ann Coal Company.[13] Munsey testified that he did not seek any particular job when he applied for work at Helen Ann Coal

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[13]Munsey testified that he never worked as a jacksetter with Helen Ann Coal Company but that he had "set jacks at Bee Coal [Company]."

Company but also that he "wanted out from the face * * * [and so he] learned to start running the bridge."

Munsey admitted that, during the time he was working with Helen Ann Coal Company, he had no thought of leaving that company to get a job at Mason Coal. He stated that he would have considered working at Mason Coal Company after he left Helen Ann Coal Company in 1974 if "they had offered me a job" but that he would not have left Helen Ann Coal Company in 1972, 1973, or 1974 to work for Mason Coal Company. During the time he worked for Helen Ann Coal Company, the company was signatory to the UMWA contract. It is clear that Munsey would not have left his job as a bridge operator and forfeited his union status with the UMWA to go to work at

the face at Mason Coal Company as a jacksetter. Munsey stated that he would not have given up a job at a union mine for one at a non-union mine. It was later established that Mason Coal Company had a contract with the Southern Labor Union.

Ralph Baker testified that, after establishing Mason Coal Company in 1972, he was asked by Munsey for a job several times; Baker told Munsey that he should come to work but Munsey never did. Baker testified in detail as to two occasions on which he offered to hire Munsey. Baker also testified that Munsey had asked him for work on four or five other occasions when the two passed on the street. Munsey never went in and filled out one of the written applications for employment but he had inquired

about working at Mason Coal Company until the time that Adrian Belcher quit. After Belcher quit in 1975, Munsey did not talk to Baker or any of his foremen regarding a job.

Baker's testimony in regard to the first of the two specific occasions on which Munsey was offered employment was that Munsey asked for a job 2 or 3 months after Mason had started running coal in June, 1972. Mason Coal had been shipping coal on spot orders to the Tennessee Valley Authority and to other utilities. The conversation took place close to the Southern Railway Depot in St. Charles. Glen Munsey started the conversation by asking if he could have a job. Ralph Baker agreed to give him a job.

Munsey then told Baker that he did not want a job--that he was already working. Baker had no idea why Munsey asked him for a job when he did not want a job, but did not think this was strange. He stated that people frequently asked him for jobs when they did not really want them.

As noted above, Munsey originally testified that he never conferred with anyone at Mason Coal Company regarding employment. On rebuttal, he softened his position somewhat. In response to the question whether this conversation in St. Charles occurred, Munsey replied "Not as I can remember." Munsey neither explained nor denied the conversation with Baker but rested on a general, equivocal denial.

In June, 1973, Munsey asked for and was given a job by Baker's foreman, Adrian Belcher. In summary, Baker's testimony was that Munsey had been sitting in a car with Adrian Belcher, a section foreman at Mason Coal Company. Baker walked up to the car and was told by Belcher that he, Belcher, had hired Munsey as a jacksetter. Baker "told him that was good." Mr. Belcher appeared to Baker to have been serious. Baker believed that Munsey said something but could not remember what it was. Nothing was said about seniority or back pay.

Munsey testified that Baker came over to the car and spoke with Adrian Belcher while he was in the car but does not know or remember what Baker and Belcher spoke about. Munsey asserted that Mr. Belcher did not hire

him to work at Mason C. .l Company at that time and that he did not even know that Belcher was a foreman at Mason Coal Company. In view of Munsey's presence in the car with Mr. Belcher when Mr. Belcher and Mr. Baker were talking, it is improbable that he was unaware at the time of the substance of the conversation. His assertions that "(he does not) know what they were talking about," followed by the assertion that he did not remember what was said will not serve to rebut Baker's testimony in this regard.

The evidence establishes that Ralph Baker agreed to employ Glen Munsey 2 or 3 months after Mason Coal Company started running coal in June of 1972 and that he again agreed to employ Glen Munsey in June of 1973. Although Ralph

Baker had refused to rehire Munsey and the Scotts at Smitty Baker Coal Company on April 29, 1971, he conditioned his refusal by stating that he would not rehire them "at that time." The record clearly shows that he was willing to hire them the succeeding year after establishing Mason Coal Company. Baker hired back Arnold and Ernest Scott, former Applicants in this proceeding. They made no agreement with Baker when they came back to work to drop their cases nor did Baker expect that they would do so when they did come back to work. No mention was made of the case nor was seniority given to them at the time. No back pay was given. Baker believed that Munsey was a skilled jacksetter and his unrebutted testimony

was that he would have been glad to have Munsey working at Mason Coal in that capacity.

Surrounding circumstances lend credence to Ralph Baker's testimony. Munsey's purported refusal of employment is consistent with his testimony that he would not have left his employment as a bridge operator at Helen Ann Coal Company to work as a jacksetter at Mason Coal Company at the time the offer was made.

Baker was serious about giving Munsey a job on the two occasions related above. At no time did he make the acceptance of a job contingent upon dropping any claims for back pay that Munsey might have against him. The offers were unequivocal, unconditional and made in good faith. Under the circumstances of this case, it is clear

that the offers of reinstatement were suitable even though a specific promise to give back pay was not included.[14]

The relief provisions of the Act were intended to compensate for injury suffered, not to place Munsey in a better position than he would have otherwise occupied. Therefore, the offers of reinstatement were suitable even though no consideration was given to lost seniority or privileges. Mason Coal Company, from its inception, had a collective bargaining agreement with the

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[14]See N.L.R.B. v. Midwest Hanger Company, 550 F.2d 1101 (8th Cir. 1977). The court therein stated at 1103: "It is clear that had the Company's offer of reinstatement been conditioned solely on its refusal to give back pay * * * then the offer of reinstatement would not have been invalidated." Citing D'Armigene, Inc., 148 NLRB 2, 15 (1964), enforced as modified, 353 F.2d 406 (2d Cir. 1965); Reliance-Clay Products, 105 NLRB 135 (1953).

Southern Labor Union rather than the United Mine Workers of America, the collective bargaining agent at the Smitty Baker Coal Company operation. Ralph Baker testified that a number of the former employees of Smitty Baker Coal Company were hired by Mason Coal Company. These employees were not accorded seniority or privileges at Mason Coal Company by virtue of their prior employment with Smitty Baker Coal Company. This practice was uniformly applied.

It is found that Ralph Baker made Glen Munsey an appropriate offer of reinstatement on two separate occasions. The first such occasion occurred 2 or 3 months after Mason Coal Company began running coal in June of 1972. The second occasion occurred in June, 1983.

Relief to be Accorded

Pursuant to the terms of section 110 of the Act, Munsey is entitled to an order requiring Respondents "to take such affirmative action to abate the violation as the Secretary deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner * * * to his former position with back pay."

Because a suitable offer of reinstatement has been made and refused, the need to offer reinstatement is now moot. Moreover, the making of the suitable offer has tolled the accumulation of lost wages due Munsey as of the date the offer was made. Respondent Ralph Baker was unable to establish the exact date on which the first conversation took place. He was able to

testify only that the conversation occurred 2 to 3 months after Mason Coal Company began running coal in June, 1972. This failure to provide a specific date must be resolved in Munsey's favor. If the operation began at the end of June, the offer could have been made as late as October 1. For the purposes of determining the relief to be accorded, the date on which this suitable offer of reinstatement occurred will be taken as October 1, 1972.

Munsey is entitled to be paid those wages he would have earned but for the illegal discrimination against him. It has already been determined that $2,013.26 was due Munsey for wages lost through October, 1971, when Smitty Baker Coal Company ceased operations. P & P

Coal Company which has been found to be a successor began operations on April 1, 1972.[15] Respondents are, therefore, liable for any wages lost by Munsey from April 1, 1972, until October 1, 1972, the date on which the accumulation of wages was found above to have tolled.

The figures provided by Munsey[16] for the amount of wages he would have earned at P & P Coal Company were computed on the assumption that it operated on a 5-day work week at a rate

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[15]While the record provides indications that P & P Coal Company Coal Company may have commenced operations in some form as early as March 13, 1972, Munsey asserted in his posthearing brief that operations actually began on April 1, 1972. The figures for lost pay offered by Munsey are calculated as of April 1, 1972.

[16]No objection was made by Respondents to the dollar amounts estimated by Munsey for the period of time from April 1, 1972, through September 30, 1972.

of $38.75 per day. If Munsey had been employed from April 1, 1972, through the end of the quarter, June 30, 1972, by P & P Coal Company, he would have earned $2,518.75. The figure provided for the second half of 1972 was calculated on the basis of 95 days worked at a rate of $38.75 and 35 days at a rate of $41.75. An appropriate figure for the third quarter wages paid by P & P Coal Company cannot be accurately reached by dividing the total half-year figure, $5,412.50, in half. Rather, it is appropriate to multiply the number of work days in the third quarter (65) times the rate in effect ($38.75). On this basis, Munsey would have earned $2,518.75 in the third quarter of 1972 had he been employed by P & P Coal Company.[17]

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[17]It is arguable that calculations must also be made of the amount of wages lost by Munsey because

Footnote 17 (Continued)
of the failure of Ralph Baker to offer him employment at Mason Coal Company until October, 1972.

The exact date on which Munsey might first have been employed by Mason Coal Company has not been established. Ralph Baker stated that the company first began running coal in June of 1972, but Respondent's Exhibit No. 2, a "Recapitulation/Work Time and Pay Rates" for Mason Coal Company, indicates that a considerable number of shifts were worked prior to June 30, 1972. No indication exists on the record, however, as to the number of employees working or the nature of the work performed.

The computation of earnings which Munsey would have made had he worked for P & P Coal Company or Mason Coal Company were both determined on a bi-annual basis. The figures provided for Munsey's actual earnings were determined on a quarterly basis.

Mason Coal Company began operations during the second quarter of 1972. If Munsey had worked at Mason Coal Company from the day it began operations through June 30, 1972, he would have earned $1,557.50. This figure reflects the wages due for 44-1/2 shifts at a rate of $35 per shift.

A total of 62-1/2 shifts were worked at Mason Coal Company at a rate of $38 per shift during the entire second half of 1972. In the absence of information which would allow a break-down of this total by quarters, the number of shifts ascribed to the third quarter is taken to be one-half of the total or 31-1/4. Munsey's earnings at Mason Coal Company in the third

Munsey appended to his posthearing brief an itemized earnings statement provided by the Social Security Administration. His earnings during the second (April-June) and third (July-September) quarters of 1972 were indicated thereon as follows:

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|---|---|
| April-June, 1972 | $2,446.80 |
| July-September, 1972 | $1,746.00 |

In view of the above, it is found that Munsey is entitled to $72 in lost wages for the second quarter of 1972 and $773 in lost wages for the third quarter. These amounts reflect the difference

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Footnote 17 (Continued)
quarter of 1972 would, therefore, have amounted to $1,187.50.

The amount that Munsey would have earned at Mason Coal Company is less than he would have earned at P & P Coal Company. Since this provides an inaccurate basis on which to calculate Munsey's loss, the calculations are based on his earnings at P & P Coal Company.

between what Munsey would have earned had he worked at P & P Coal Company and his actual earnings during the pertinent period of time.

Costs and Expenses

Section 110(b)(3) of the Act reads as follows:

> (3) Whenever an order is issued under this subsection, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees) as determined by the Secretary to have been reasonably incurred by the applicant, for, or in connection with, the institu-

> tion and prosecution of such proceedings, shall be assessed against the person committing such violation.

On the basis of this provision, Munsey asserts that he is entitled to attorney's fees of $108,962.50 and costs of $367.16.

Mr. Munsey testified that he was represented first by Charles Widman, then by Willard Owens and finally, by the current attorney of record, Steven Jacobson. Charles Widman and Willard Owens were salaried members of the legal staff of the UMWA during the time they represented Glen Munsey. Steven Jacobson was a salaried member of the UMWA legal staff until September, 1976.

Thereafter, Mr. Jacobson continued his representation of Glen Munsey in a private capacity.

Munsey stipulated that he had never been charged for expenses and is not expected to pay back fees. He testified that he was not obligated to the Union for its provision of the services of these three attorneys. Munsey also testified that he never discussed fees with any of these attorneys, including Mr. Jacobson.

Section 110(b)(3) is couched in terms which, in pertinent part, provide for assessment against Respondents of the costs and expenses, including attorney's fees reasonably incurred by the Applicant. As a threshold question, it must be determined whether recovery may be had by Munsey despite his stipulation that he did not incur any

obligation to pay attorney's fees, costs, or expenses.

Congress enacted the provision for attorney's fees in section 110(b)(3) to encourage individuals injured by unlawful discrimination to vindicate their private rights under the Act even though the personal recovery anticipated by the Applicant would, in some cases, be far less than the costs and expenses incurred in maintaining the action. Provision of costs and expenses was, therefore, a critical element of the enforcement scheme envisioned by Congress. In order to vindicate the right of miners as a class to be free from unlawful discrimination, the inherent disincentive presented by costs and expenses in excess of anticipated recovery was removed.

Respondent asserts that the Act specifically limited the recoverable costs and expenses to those actually incurred by the Applicant. It was argued that Munsey did not incur attorney's fees because he was not personally obligated for costs and expenses to those who represented him.

Respondents' argument is without merit. It places undue emphasis on the phrase "incurred by applicant," and, if adopted, would eviscerate the enforcement scheme envisioned by Congress. It makes no sense to restrict recovery of costs and expenses to applicants who have formally agreed to pay these costs and expenses when section 110(b)(3) was enacted in recognition of the chilling effect that such obligations would have on the assertion of the

rights afforded by the antidiscrimination provisions of the Act. Munsey did not incur a formal obligation to pay costs and expenses because he could not afford to meet such an obligation. His situation was precisely that which Congress intended to remedy with the enactment of section 110(b)(3).

No reason can be found to warrant reduction in the level of enforcement afforded by section 110(b) by attaching significance to a formalized obligation to pay. An attorney providing free legal services in the vindication of section 110(b) rights stands in the same position as one to whom a fee is owed.

Compensation for legal services rendered in the absence of legal obligation on the part of the client to pay

have been awarded to attorneys in private practice, private legal services organizations, foundations, and public-interest law firms pursuant to statutory provisions for awarding of attorney's fees. Applicant has advanced no convincing reason nor any legal authority to justify the extension of the right to recover fees or expenses under such circumstances to unions or collective bargaining agents. It is likewise inappropriate that Mr. Jacobson be awarded attorney's fees personally for the legal services he provided while in the employment of the UMWA. Recovery of attorney's fees and expenses will therefore be allowed only for those services rendered and expenses incurred by Mr. Jacobson while he represented Munsey in the capacity of a private practitioner.

Respondent argued that attorney's fees had been disallowed in the recommended decision herein, issued June 25, 1976, and that the Board of Mine Operations Appeals had overruled Applicant's exception to the disallowance in its decision of June 30, 1977 (Glenn Munsey v. Smitty Baker Coal Company, et al., 8 IBMA 43 (1977)). The Board found that "Munsey failed to met his prima facie burden consistent with the requirement of section 110(b)" and denied "all exceptions not dealt with specifically." The Court of Appeals affirmed the Board in part, reversed it in part, and remanded for consideration of specific issues. Glenn Munsey v. Federal Mine Safety and Health Review Commission, 595 F.2d 735 (D.C. 1978).

The Court did not specifically affirm or reverse the Board's denial of Applicant's exception to the disallowance of attorney's fees.

The Board did not offer an explanation for its denial of Respondent's exception. It is entirely possible that the Board denied the exception because recovery of expenses pursuant to section 110 was premised on Applicant's prevailing in his claim of discrimination. The Court of Appeal's reversal in part on substantive grounds undermines the Board's denial of the exception.

The basis for disallowing attorney's fees was not made on substantive grounds but, rather, was based on the failure of Applicant to submit evidence to establish the existence of such

expenses. If the disallowance of fees to that point in time stands, it would affect provisions of attorney's fees accrued through June 25, 1976. As noted above, recovery of fees prior to that time is denied on other grounds. As a result, Respondent's argument is moot.

The starting point for computation of fees is achieved by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit.[18] This starting figure has been termed the "lodestar." The lodestar fee is then adjusted to reflect a variety of other factors.

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[18]The method utilized in setting the attorney's fees due herein has been gleaned in large part from Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) (hereinafter, Copeland).

Counsel for Applicant submitted the following information with respect to the hours spent representing Mr. Munsey from 1977 through the present. This information was contained in Applicant's Exhibit No. 6 which was accepted into evidence subject to the filing of available supporting materials:

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| Preparation of petition for D.C. Circuit review | | .50 |
| Preparation of D.C. Circuit brief and joint appendix | | 88.50 |
| | | 89.00 |
| 1977 - 89.00 hours at $70/hr | = | $6,230.00 |
| Preparation of opposition to briefing extension | | 1.75 |
| Preparation of motion to substitute parties and reply to opposition thereto | | 9.00 |
| Preparation of reply brief | | 53.75 |
| Preparation of motion for expedited oral argument | | 6.00 |

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|---|---|
| Preparation of letter to Court | 1.75 |
| Preparation for and attendance at D.C. Circuit argument | 27.50 |
| Preparation of opposition to motion to vacate award of costs | 3.75 |
| Preparation of materials for Commission on remand | 39.75 |
| | 143.25 |

1978-79 - 143.25 hours at $80/hr. = $11,460.00

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|---|---|
| Preparation of July 1980 letter to Commission, telephone calls from Commission staff re documents | 5.75 |
| Preparation for and attendance at 1981 hearing and preparation of requests for supplemental documents | 46.00 |
| Preparation of materials on remand | 27.50 |
| | 79.25 |

1980-81 - 79.25 hours at $110/hr. - $8,772.50

Counsel for Applicant supplemented Exhibit No. 6 with an affidavit attached to the posthearing brief filed herein on June 25, 1981. He stated that Exhibit 6 reflected the "various tasks I have performed in connection with this case, and the hours I spent in performance." Counsel did not state whether the hours claimed were established by daily records, by reconstruction through close examination of the record of the case or by mere estimation.

The submissions of counsel for Applicant, though perfunctory, were sufficient to permit a determination of reasonableness to be made. It is found that counsel for Applicant reasonably

expended 89 hours[19] in 1977, 143.25 hours in 1978-1979, and 79.25 hours in 1980-81.

In an affidavit submitted with the posthearing reply brief, Mr. Jacobson offered the following information. Mr. Jacobson is a member of the California, District of Columbia and Illinois Bars. He graduated from Harvard Law School in 1973. From 1973 to 1977, he was a staff attorney for the UMWA with responsibility for mine safety litigation; since 1977, he has been in

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[19]Respondent objected to 88.5 hours claimed to have been expended in the preparation of the second brief to the D.C. Court of Appeals because "as to most of the issues presented by that appeal and brief, he lost." Each of these issues was closely related to the cause upon which Applicant has ultimately prevailed. Under such circumstances, the failure to prevail on specific issues is not a proper basis for denying recovery for time spent thereon.

private practice. He has argued "numerous precedent-setting cases" in the mine safety and health area.

Mr. Jacobson stated that his billing rate was $70 per hour in 1977, $80 per hour in 1978 and 1979, and $110 per hour in 1980 and 1981. It is found that these are reasonable rates in the community for similar work. It is also found that these dollar amounts accurately reflect the value of Mr. Jacobson's time, given his background and, particularly, his expertise in matters of this sort.[20]

The number of hours reasonably expended by Mr. Jacobson multiplied by

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[20]See Meisel v. Kremens, 80 FRD 419 (E.D. Pa. 1978), citing Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corporation, 487 F.2d 161 (3d Cir. 1973).

reasonable hourly rates result in a lodestar figure of $26,462.50. The burden of justifying any deviation from this figure rests with the party proposing the deviation. Copeland at 892.

Counsel for Applicant argued that the lodestar amount should be doubled in view of the contingent nature of the litigation and the quality and value of the work performed. This request is denied. The hourly rate underlying the lodestar figure reflects an allowance for the contingent nature of Mr. Jacobson's compensation. In addition, much of counsel's work was performed after the U.S. Court of Appeals had made it clear that Munsey was to prevail at least in part. An adjustment on the basis of quality and value of the representation is

appropriate only when the representation is "unusually good or bad, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute" the lodestar figure. Copeland at 893. No adjustment for the quality and value of the representation is warranted herein.

The interests at issue and the results obtained are factors to be considered in determining whether a fee is reasonable. The back pay recovered by Munsey is far exceeded by the attorney's fees awarded herein. In succeeding on the merits, however, Applicant vindicated not only his personal right but the rights of all miners as a class to be free of unlawful, safety-related discrimination. A reduction in attorney's fees because the fees

exceed Mr. Munsey's back pay recovery is not warranted.

Applicant also claimed compensable expenses in this proceeding as follows:

| | |
|---|---|
| Duplicating | $200.00 |
| Transcript of 1981 hearing | 135.16 |

In view of the extensiveness of this proceeding, the claim for duplicating expenses seems reasonable and will be allowed. Applicant is clearly entitled to recover his expenses for a transcript of the 1981 hearings. Accordingly, expenses in the total amount of $335.16 are awarded herein.

In view of the fact that Munsey incurred no formal obligation for attorney's fees or expenses, either to the UMWA or Mr. Jacobson, the order entered herein will require that payment

of the awarded fees be made directly. Miller v. Amusement Enterprises, Inc., 426 F.2d 534, 539 (5th Cir. 1970); Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974).

ORDER

In its decision remanding this case for proceedings necessary to further determine the additional amount of lost wages and interest due Munsey, the Commission ordered Ralph Baker, Smitty Baker Coal Company, and P & P Coal Company, jointly and severally, to pay the amount of $2,013.26 plus interest to Munsey. It is further ordered that these Respondents, jointly and severally, pay the additional amount of $845.00, which makes a total amount of $2,858.26, plus interest within 30

days of the date of this order. Interest is to be computed on the total amount at a rate of 8 percent until the date of payment.

It is further ORDERED that Respondents, jointly and severally, pay attorney's fees in the amount of $26,462.50 and expenses in the amount of $335.16 to Steven Jacobson, Esq., within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 82-1079

GLEN MUNSEY, PETITIONER

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

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No. 82-1084

SMITTY BAKER COAL COMPANY, INC. and RALPH BAKER, PETITIONERS

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION, RESPONDENT

GLEN MUNSEY, INTERVENOR

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Petitions for Review of an Order of the Federal Mine Safety and Health Review Commission

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Argued February 4, 1983

Decided March 11, 1983

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

*Steven B. Jacobson* for Glenn Munsey, petitioner in No. 82-1079 and intervenor in No. 82-1084.

*J. Edward Ingram* for Smitty Baker Coal Company, Inc. *et al.*, petitioners in No. 82-1084.

*James A. Lastowka*, General Counsel, Federal Mine Safety and Health Review Commission, was on the statement in lieu of brief for respondent. *Palma R. Vanni*, Attorney, Federal Mine Safety and Health Review Commission, entered an appearance for respondent.

Before WRIGHT and BORK, *Circuit Judges*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the court *per curiam*.

PER CURIAM: This case has twice before been heard by this court. *See Munsey v. Morton*, 507 F.2d 1202 (D.C. Cir. 1974); *Munsey v. Federal Mine Safety & Health Review Comm'n*, 595 F.2d 735 (D.C. Cir. 1978). The opinions issued on those prior occasions fully set forth the factual background of this case and underscore the urgent need to bring this litigation to an end.

This court, with one exception noted below, upholds the determinations of the Federal Mine Safety and Health Review Commission, generally for the reasons set forth in the findings of the Administrative Law Judge adopted by the Commission. *See* 3 Joint Appendix (JA) 1665-1682, 1716.

We reverse the determination of the Commission that petitioner Munsey cannot be awarded *any* costs or attorney fees for the period during which he received free representation by staff counsel of his union. The ALJ recognized that under the Federal Coal Mine Health and Safety Act, 30 U.S.C. § 820(b)(2) (1976), successful petitioners are entitled to recover their attorney fees and that under such authority fees have been awarded to attorneys in private practice, private legal services organizations, and public interest law firms. However, he saw nothing "to justify the extension of the right to recover fees or ex-

penses under such circumstances to unions or collective bargaining agents." 3 JA at 1679.

The ALJ is incorrect. This circuit has recognized that unions and union attorneys are entitled to costs and attorney fees for representation of union members. *Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury*, 656 F.2d 848 (D.C. Cir. 1981). If attorney fees are awarded to the union itself rather than its attorney, the union can only recoup the expenses it incurred in supplying services to the client; above-cost fees to the union itself would be inappropriate. *Id.* at 853. If attorney fees are awarded to the attorney alone (and not for the union's general treasury), the attorney is entitled to receive the market value of the services rendered. The mere fact that an attorney is a salaried employee of the union should not affect the size of the fee to which he is entitled. *Id.* at 850. "Reasonableness, in terms of market value of the services rendered, is the sole limit on fee awards to organizationally-hired lawyers when the fees are to be paid to the lawyers alone." *Id.* at 852-853.

On remand, the Commission should determine the amount to be awarded in accordance with the standards set forth in *Nat'l Treasury Employees Union v. U.S. Dep't of the Treasury, supra.*[1]

*Affirmed in part and reversed and remanded in part.*

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[1] We note that in past cases we have required salaried attorneys recovering the market value of their services from defendants to reimburse their employers for the kinds of expenses the employers incurred that would normally be included in an attorney's fee, including the salaries of the lawyers and their adjunct staff. *See Wilderness Society v. Morton*, 495 F.2d 1026, 1037 (D.C. Cir. 1974) (*en banc*), *rev'd on other grounds sub nom. Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). In this case, however, Munsey's attorney represented at oral argument that he and the union had agreed to allow him to collect the full fee without reimbursement of the union's expenses. On the strength of this representation, we direct that all fees go to the attorney himself.

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No.82-1084 September Term, 1982

Smitty Baker Coal Company,
Inc., and
Ralph Baker,
Petitioners

v. Argued 2-4-83

The Federal Mine Safety and
Health Review Commission,
Respondent

---

Glen Munsey,
Intervenor.

---

And consolidated case No. 82-1079

BEFORE: Wright and Bork, Circuit Judges
and McGowan, Senior Circuit
Judge

O R D E R

On consideration of
petitioners' petition for rehearing,
filed April 22, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:
George A. Fisher, Clerk

BY:
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 82-1084 September Term, 1983

Smitty Baker Coal Company,
Inc., and
Ralph Baker,
Petitioners,

v. Argued 2-4-83

The Federal Mine Safety and
Health Review Commission,
Respondent,

---

Glen Munsey,
Intervenor.

---

And consolidated case No. 82-1079

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

O R D E R

Petitioners' suggestion for rehearing en banc has been circulated to

the full Court and no member of the court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

*Per Curiam*

FOR THE COURT:
George A. Fisher, Clerk

BY:
Robert A. Bonner
Chief Deputy Clerk